In the Supreme Court
of the
United States

October Term, 1958

No. 48

United States of America for the Benefit and on Behalf of [illegible]

Petitioners,

vs.

Donald [illegible]

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the [illegible] Circuit

[illegible]

[illegible]

[illegible], Jr.,

[illegible]

[illegible]

[illegible], San Francisco, California,

Counsel for Petitioners.

Johnson & [illegible],

111 Sutter Street, San Francisco 4, California,

Of Counsel.

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In the Supreme Court
OF THE
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OCTOBER TERM, 1956

No. 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

I. THE BASIC ISSUE—ANSWER TO THE ARGUMENT THAT RESPONDENT SURETY HAS FULFILLED THE EXPRESS CONDITION OF ITS BOND.

Respondents make the basic contention that since the contractor, respondent Carter Construction Com-

pany, paid the hourly wages of the laborers in full, "the express condition of the payment bond has been fulfilled and the requirements of the Miller Act satisfied" (Resp. Br., p. 6).

The express condition of the payment bond, however, imposes a broader obligation than that of merely paying hourly wages. The condition is that the contractor "promptly make payment to all persons supplying labor." This condition includes the obligation to pay hourly wages in full, but it also includes, we submit, the obligation to pay any other agreed consideration for the labor supplied.

It is undisputed in this case that the contractor's agreement to make contributions to the Laborers Fund was a part of the agreed consideration for the services of the laborers who worked on the bonded projects. Petitioners alleged that such was the fact (R. 7-8) and Respondents admitted that this allegation was true (R. 13).

The agreement that part of the consideration for the services of the individual laborers, amounting to 7½ cents per hour worked, would be paid to petitioners in trust for the laborers was negotiated on behalf of such laborers by the Laborers District Council. Under the provisions of the National Labor Relations Act, as interpreted by this Court, the Council was the exclusive bargaining agent of the laborers with broad authority to represent them in collective bargaining negotiations and to make contracts with employers on their behalf (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 337-343; *Aeronautical Lodge v.*

Campbell (1949) 337 U.S. 521, 526; *Wallace Corp. v. Labor Board* (1944), 323 U.S. 248, 255; *J. I. Case Co. v. Labor Board* (1944) 321 U.S. 332). The consideration that the Council offered to the contractors in return for their agreement to make payments to petitioners—and the *only* consideration that it had to offer—was the services of the men it represented and for whom it spoke. While the agreement was made with the Council, the legal effect of the agreement, as related to Carter Construction Company and the individual laborers who worked on Carter's projects, was the same as that of an agreement with identical terms between Carter and each of the laborers (Rest. of Agency, §292; 2 Am. Jur. 304, Agency, §388; *Baldwin v. Bank of Newberry* (1863), 68 U.S. 234, 241). Further, petitioners are not only trustees for the individual laborers; they are also designated by the Labor Management Relations Act as "representatives" of such laborers (Sec. 302; 29 U.S.C. Sec. 186; *United States v. Ryan* (1956), 350 U.S. 299, 305).

The arguments advanced by Respondents would require this Court to find that when the laborers agreed, through their Union Council, that 7½ cents per hour of the consideration for their services would be paid to petitioners as trustees for their benefit, and as their statutory representatives to receive such payments, they waived *pro tanto* their rights under the Miller Act. We respectfully urge upon the Court that no such waiver was intended and that, in view of the salutary purposes of the Miller Act, an involuntary and unintended waiver should not be found to have taken place.

It is of no significance, we submit, that "The obligation to pay the contributions into the . . . Fund did not arise under the contract between the United States and the contractor but was created by an agreement entered into between the contractor and a union independent of the contract with the United States" (Resp. Br., pp. 7-8). The obligation of the contractor to pay the hourly wage rates that were paid to the laborers arose out of the same collective bargaining agreement which imposed the obligation to make contributions to the Fund. It happens that these wage rates were recognized by the Federal government as the prevailing wage rates which, under the Davis-Bacon Act, the contractor was required to pay to the laborers, but this statutory command merely reinforced a contractual obligation which already existed.

We submit, further, that it is of no significance that, by virtue of the agreement with the Laborers District Council, the contributions payable to petitioners have certain characteristics, emphasized by Respondents, which distinguish them from hourly wages. These characteristics are (1) that the individual laborer is expressly foreclosed from any right to receive the contributions in lieu of benefits, (2) that he must work at least 400 hours in a six-month period for contributing employers in order to be entitled to insurance benefits, (3) that once eligible for insurance benefits, he remains eligible for a six-month period whether or not he continues working in the industry, (4) that contributions are made with respect to some laborers who never become eligible for benefits and

(5) that the individual laborer pays no income tax upon the amount of his employer's contributions.

The first four of these characteristics, as we pointed out in our opening brief (pp. 45-46), were deemed by the negotiating parties to be essential to the establishment of a workable health and welfare program for construction laborers. By adopting these provisions the parties were able to set up a sound program providing very substantial benefits for those laborers who identified themselves with the construction industry by working 20 weeks or more per year for employers contributing to the Fund. This established, operating program benefits all construction laborers in the bargaining unit, since the laborer who may not qualify in one work period has the continuing prospect of qualifying in succeeding periods by meeting the minimum work requirements. The agreement of the Laborers District Council to the provisions which made this program possible was well within its authority and discretion as the statutory representative of all the laborers in the bargaining unit (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338, *supra; Steele v. Louisville & Nashville Railroad Co.* (1944) 323 U.S. 192, 203; *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America* (1955) 203 Ore. 342, 279 Pac. (2d) 508, 512, *reh'g den.*, 280 Pac. (2d) 412).

With regard to the fifth characteristic, Congress has declared that for the purpose of the Federal Income Tax "gross income" shall not include contributions by the employer to accident or health plans for

his employees (26 U.S.C. Sec. 106). It has likewise provided that such contributions shall not constitute "wages" as defined in the Federal Insurance Contributions Act (26 U.S.C. Sec. 3121(a)(2)) and in the Federal Unemployment Tax Act (26 U.S.C. Sec. 3306(b)(2)). The manner in which these provisions have been stated, however, makes clear that Congress considered that such contributions are remuneration for services and that in the absence of express exclusion they would have been "income" or "compensation" subject to tax within the broad scope of these Acts. The inference to be drawn from these provisions is, not that such contributions fall outside the concept of compensation for labor performed, but that they are so socially desirable and favored by Federal public policy that they should not be taxed.

It follows from the foregoing that since Carter Construction Company did not pay the contributions it had agreed to make into the Fund, it did not pay in full for the labor furnished by the individual laborers, and the condition of the payment bond has not been fulfilled.

II. REPLY TO THE AUTHORITIES CITED BY RESPONDENTS IN SUPPORT OF THEIR BASIC CONTENTION.

The first authority cited by respondents in the body of their argument, *MacEvoy Co. v. United States* (1944) 322 U.S. 102, has no pertinence to this case.

The obligation which petitioners seek to enforce is one incurred directly by the prime contractor, Carter,

to the individual laborers through their Union Council. The rate of the obligation was fixed by the same collective bargaining agreement that fixed the rates of the hourly wages to be paid to the laborers. The prime contractor and its surety had direct knowledge of the extent of their obligation from the prime contractor's own payrolls, and there is no issue in this case, as there was in the *MacEvoy Co.* case, of protecting the prime contractor or its surety against "remote and undeterminable liabilities" (322 U.S. 110).

Respondents' next citation, *In re Brassel* (D.N.Y. 1955) 135 Fed. Supp. 827, is one of a series of district court and bankruptcy referee decisions involving the question as to whether contributions to a health and welfare fund are "wages" within the meaning of that term as used in subsection a(2) of Section 64 of the Bankruptcy Act (11 U.S.C. Sec. 104a(2)). At least one of these decisions, *In the Matter of Sleep Products, Inc.* (D.N.Y. 1956) 141 F. Supp. 463, is pending on appeal before the United States Court of Appeals for the Second Circuit, and the question may ultimately reach this Court for decision. We do not concede the correctness of these lower court decisions, but it would seem sufficient for the purposes of this case to point out that the wording of Section 64a(2) of the Bankruptcy Act is more restrictive than that of the Miller Act and arguably, unlike the Miller Act, is subject to a rule of strict construction (*In the Matter of Sleep Products, Inc., supra,* p. 469). Further, the case of *In re Brassel* is factually distinguishable from this case, in that the benefits of the

welfare fund there involved were limited to union members whereas the benefits of the Laborers Fund are extended to every employee in the bargaining unit who qualifies by working 400 hours in a six month period for contributing employers, regardless of whether or not he is a member of the Laborers Union (R. 35).

The opinion of the California Attorney General reported at 22 Ops. Cal. Atty. Gen. 198, deals with an internal problem of the State of California relating to its own employees, and has no standing as an authority apart from this problem. The distinction drawn between "wages" or "compensation", on the one hand, and "conditions of employment," on the other, has no relevance to the issue in this case as to whether health and welfare contributions constitute payments due for labor within the meaning of the Miller Act.

In *City of Portland v. Heller* (1932) 139 Ore. 179, 9 Pac. (2d) 115, the court denied a recovery on the payment bond there involved because the plaintiff association had no contractual relationship with the employees who furnished services and had no basis for claiming as an equitable assignee of such employees. For the reasons stated in our opening brief (pp. 33-34), which have not been answered by respondents, petitioners in this case are entitled to claim as equitable assignees as well as trustees and statutory representatives of the laborers, and accordingly the *City of Portland* case supports our position rather than that of respondents.

United States ex rel. Southern G.-F. Company v. Landis & Young (W.D.La. 1935) 16 Fed. Supp. 832, *United States ex rel. New York Casualty Co. v. Standard Surety & Casualty Co. of New York* (S.D. N.Y. 1940) 32 F. Supp. 836, and other cases holding that premiums due for employers' liability and workmen's compensation insurance are not recoverable under a Miller Act bond, are clearly distinguishable from the case before this Court. The basic purpose of employers' liability and workmen's compensation laws is to shift the cost of industrial injuries from the workman and his dependents to the industry itself (*Baltimore & P. S. B. Co. v. Norton* (1932) 284 U.S. 408, 414), and most of these laws prohibit an employer from making or taking any deduction from the earnings of any employee either directly or indirectly to cover the whole or any part of his workmen's compensation obligation (Calif. Labor Code, Sec. 3751; 33 U.S.C. Sec. 915(a); *Mountain Timber Co. v. Washington* (1917) 243 U.S. 219, 246). In these circumstances the premium charged to an employer for workmen's compensation insurance could not, by any possibility, be considered a part of the consideration paid for the services of the insured employees and the insurance carrier could have no claim to status as an assignee of such employees.

Bill Curphy Co. v. Elliott (5th C.A. 1953) 207 F. (2d) 103 and *United States for use of Dorfman v. Standard Surety and Casualty Co. of New York* (S.D. N.Y. 1941) 37 F. Supp. 323, are not relevant because plaintiffs do not claim as creditors who advanced

money to Carter to pay for the services of the laborers. They claim as trustees for the laborers who performed the services and in the right of such laborers, who have not been paid in full for their services.

United States for the use of Gibson v. Harman (4th C.A. 1951) 192 F. (2d) 999, relies on and follows the cases, considered *supra,* which hold that employers' liability and workmen's compensation insurance premiums are not recoverable under a Miller Act bond. The case is distinguishable on the same basis as the cases which it follows, and on the further ground that an uninsured workmen's compensation award is a too "remote and undeterminable" liability to be imposed upon the prime contractor under the Miller Act (see *MacEvoy Co. v. United States* (1944), 322 U.S. 102, 110, *supra*).

The remaining cases cited by respondents in support of their basic contention that the condition of the payment bond has been fulfilled (*U. S. Fidelity & Guaranty Co. v. United States* (10th C.A. 1952) 201 F. (2d) 118; *United States v. Crosland Construction Company* (4th C.A. 1954) 217 F. (2d) 275; *United States v. Zschack Construction Co.* (10th C.A. 1954) 209 F. (2d) 347; *Westover v. William Simpson Construction Co.* (9th C.A. 1954) 209 F. (2d) 908; *Fireman's Fund Indemnity Co. v. United States* (9th C.A. 1954) 210 F. (2d) 472, and *General Casualty Co. of America v. United States* (5th C.A. 1953) 205 F. (2d) 753) are all cases holding that the United States cannot recover on a Miller Act payment bond for federal income or social security

taxes withheld by the contractor from the wages of his employees and not paid over to the Government. These cases were decided on the theory, clearly stated in the *United States Fidelity & Guaranty Co.* case (201 F. (2d) 120):

> "that when an employer withholds the tax from an employee's wage and pays him the balance the employee has been paid in full. He has received his full wage. Part of it has gone to pay his withholding tax and the balance he has. **The employer has discharged his contractual obligation to pay the full wage.*** Thereafter there remains only his liability for the tax he has collected. That is a tax liability for which he alone is liable to the Government as for any other taxes which he may owe."

In the case now before this Court, there can be no contention that the contractor, Carter Construction Company, has discharged its contractual obligation in full. As part of a single collective bargaining agreement, Carter agreed not only to pay the hourly wages of his laborers in full but also to pay contributions of 7½ cents for each hour they worked to petitioners on their behalf and for their benefit. Petitioners have brought this action to enforce the second aspect of this contractual obligation and the income tax withholding cases, insofar as they have any pertinence to this proceeding, support petitioners' right to such enforcement.

In the income tax withholding cases the courts have emphasized that the Government, in suing the con-

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*Emphasis added.

tractor and his surety for the amount withheld from the wages of the employees, is seeking to enforce a statutory obligation owed by the contractor alone directly to the Government. The point is made in these cases that the employees have been fully discharged of their tax obligation and that the Government is not suing on their behalf or for their benefit. The courts have expressly rejected the Government's contention that "'Under the circumstances the United States succeeds by operation of law to the rights of the wage earners to the amounts deducted and withheld from wages as effectively as if it had taken a written assignment from the wage earners covering the withheld portion of their wages'" (201 F. (2d) 120).

Petitioners, on the other hand, have alleged that they are "duly authorized to sue and collect [the sums in suit] on behalf of and for the benefit of [the] laborers" (R. 10) and respondents have admitted that this allegation is true (R. 13). Accordingly since petitioners *are* suing to enforce an undischarged contractual obligation, as trustees for and representatives of the laborers who performed the services which created the obligation, the decisions in the income tax withholding cases are authority *for* rather than against petitioners' right to recover in this action.

III. ANSWER TO THE ARGUMENT THAT PETITIONERS' CLAIM CANNOT BE BROUGHT WITHIN THE LETTER OF THE MILLER ACT BECAUSE PETITIONERS DID NOT FURNISH THE LABOR AND THE AMOUNT CLAIMED IS NOT JUSTLY DUE TO THE LABORERS WHO DID.

Petitioners do not dispute that they did not furnish labor to the bonded projects and that, under the applicable collective bargaining agreement and the trust agreement "Exhibit C" (R. 21), they are the ones who have been expressly given the power to demand and enforce the prompt payment of contributions to the Fund (R. 21, Exh. C, p. 8).

Carter's obligation to make payments into the Fund, however, was an obligation imposed primarily by the collective bargaining agreement rather than by the trust agreement (R. 7). The collective bargaining agreement was negotiated by the Laborers District Council as agent for the individual laborers, and accordingly, under established principles of agency, the obligations imposed by that agreement, including the obligation to make payments into the Fund, run directly to the individual laborers (Rest. of Agency, § 292 and other authorities cited *supra*, p. ....). For the reasons given in our opening brief (pp. 45-46), the power to enforce the obligation to make payments to the Fund has been placed in the hands of petitioners as trustees for the laborers and as their statutory representatives, but the basic obligation itself remains an obligation owed to and "due" the laborers for the labor they have furnished.

Petitioners do not contend that the words of the Miller Act cover their claim with precision, but they

do contend that the words are as applicable to them as to assignees of the laborers and that their claim is clearly within the spirit and intent of the Act.

IV. ANSWER TO THE ARGUMENT THAT LIQUIDATED DAMAGES AND ATTORNEYS' FEES ARE NOT RECOVERABLE AGAINST RESPONDENT SURETY.

Respondents' argument that liquidated damages and attorneys' fees are not recoverable in this action is based upon a misapprehension of fact. They argue that these items, "not being an integral part of the obligation to pay for labor performed, cannot be covered by the bond" (Br. p. 32).

As we pointed out at pages 39 to 41 of our opening brief, however, the agreement of Carter to pay liquidated damages and attorneys' fees *was* an integral part of its obligation to pay the portion of the agreed consideration for the services of its laborers allocated to health and welfare contributions. The right to recover these items being established by contract, it is unnecessary for petitioners to point to any express statutory provision for their recovery.

V. CONCLUSION.

For the reasons we have given above and in our opening brief, we respectfully submit that respondents have *not* fulfilled the condition of their bond. They have not paid in full for the labor that was supplied to respondent contractor, and the manifest intent of

Congress in enacting the Miller Act will not be carried out unless petitioners are permitted to recover in this action.

Dated, November 13, 1956.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.,
CHARLES P. SCULLY,
Counsel for Petitioners.

JOHNSON & STANTON,
Of Counsel.